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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-829

LEILA MOURNING, PETITIONER

v.

FAMILY PUBLICATIONS SERVICE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, submits this brief *amicus curiae* because the important questions presented by this case which relate to the administration of the Truth in Lending Act, warrant consideration by this Court.

QUESTIONS PRESENTED

1. Whether the Federal Reserve Board acted beyond its rulemaking authority under the Truth in Lending Act in promulgating the "four installment rule" of Regulation Z, which provides that any credit transaction payable in more than four installments

is subject to the disclosure rules of the Act regardless of whether there is an identified finance charge involved in the transaction.

2. Whether the four installment rule creates a "conclusive presumption" regarding the imposition of finance charges that violates the due process clause of the Fifth Amendment to the Constitution.

STATEMENT

Under the Truth in Lending Act, 15 U.S.C. 1601-1665, creditors who regularly extend "credit" must disclose "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed," 15 U.S.C. 1631(a), information such as the cash price, the amount of the down payment, the total amount to be financed, the amount of the finance charge, and the number and amount of payments required. 15 U.S.C. 1638(a). Since creditors could easily evade the Act's requirements by ceasing to identify the finance charge while inflating their "cash" price,[1] and since the Federal Reserve Board has the duty of prescribing rules and regulations "to prevent circumvention or evasion" of the Act, 15 U.S.C. 1604, the Board's Regulation Z includes within the class of covered creditors any creditor who extends credit in a transaction where repayment, pursuant to an agreement, is or may be made in more than four installments. 12 C.F.R. 226.2(k).

[1] Federal Reserve Board letter, No. 86, August 26, 1969, from J. L. Robertson, Vice-Chairman, Board of Governors, Federal Reserve Board, summarized 1 C.C.H. Consumer Guide ¶ 30,457. See also Federal Reserve Board letter, July 24, 1969, 1 C.C.H. Consumer Credit Guide, ¶¶ 30,113, 30,114; and note 11, *infra*.

Petitioner Leila Mourning brought this action in the United States District Court under the Act, 15 U.S.C. 1640, alleging that on August 19, 1969, she entered into a written contract with Family Publications Service, Inc. (hereinafter FPS) for the purchase of magazines; that in addition to her downpayment of $3.95 the contract obligated her to make thirty monthly payments of $3.95 each in return for a sixty months' subscription to four magazines; and that FPS failed to disclose the total purchase price of the magazines, the unpaid balance and other matters, as required by Regulation Z, 12 C.F.R. 226.8 and the Act, 15 U.S.C. 1638.

On cross-motions for summary judgment the district court held that FPS had violated the Truth in Lending Act and Regulation Z by extending credit in a transaction involving more than four installment payments without making the required disclosures (Pet. App. 3a–5a). The court found that FPS had extended "consumer credit" within the meaning of the Act, 15 U.S.C. 1602; see 12 C.F.R. 226.2(k): FPS had given petitioner a sixty-month subscription in exchange for a promise to pay a specified sum in thirty monthly installments; the contract provided that it could not be cancelled and that failure to make monthly payments would render the entire balance due; and FPS itself considered the transaction to be a credit transaction (Pet. App. 4a). Pursuant to the Act's civil penalty provision, 15 U.S.C. 1640(a), the court awarded petitioner $100 together with attorney's

fees of $1,500 (Pet. App. 5a).[2] The district court did not question the validity of the four installment rule in Regulation Z.

The court of appeals reversed, holding that the Board had exceeded its statutory authority in promulgating the four installment rule (Pet. App. 6a–23a).[3] In the court's view, the Act "requires that a finance charge must be found present, directly or indirectly," in a transaction before the creditor is subject to the disclosure rules (Pet. App. 19a). But under the Board's four installment rule, disclosure is required "whether or not there is found in such transactions the imposition of a finance charge as an incident to the extension of credit" (*id.*). The court therefore held that the Act did not authorize the Board's regulation.

The court of appeals also held that the four installment rule created a "conclusive presumption" that a finance charge had been imposed, that such a conclusive presumption violates the due process clause of the Fifth Amendment, and that Congress itself thus could not have validly enacted the four installment rule. The court accordingly held the Board's rule void (Pet. App. 21a–23a).

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[2] The civil penalty in actions brought by consumers is set by the Act at "twice the amount of the finance charge * * * except that the liability * * * shall not be less than $100 nor greater than $1,000." 15 U.S.C. 1640(a)(1).

[3] The court of appeals did not pass on the question whether FPS had extended credit as the district court found.

INTEREST OF THE UNITED STATES

The court of appeals has invalidated a significant regulation designed to prevent evasion and circumvention by creditors of their consumer protection obligations under the Truth in Lending Act. The Federal Reserve Board has[4] the duty of promulgating rules and regulations, such as that involved in this case, in order to secure compliance with the Act, 15 U.S.C. 1604, and the Federal Trade Commission has general enforcement responsibilities under that Act,[4] 15 U.S.C. 1607(c).[5] Both agencies believe that the decision below will impair public and private enforcement of the Act[6] and will significantly impede full realization of the Act's goal of assuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601.

DISCUSSION

This case presents important questions regarding the Truth in Lending Act. The court of appeals has invalidated the Board's regulation requiring disclo-

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[4] Other federal agencies have specific enforcement responsibilities in limited areas. 15 U.S.C. 1607(a).

[5] A violation of the Truth in Lending Act is a violation of the Federal Trade Commission Act, 15 U.S.C. 1607(c).

[6] Under 15 U.S.C. 1640, consumers may sue creditors for violations of the Act in any court of competent jurisdiction.

sure by creditors in transactions without identified finance charges. The Board adopted this regulation in order to protect consumers making installment purchases, a method of buying that has markedly increased in popularity over the years and has given rise to a $107 billion consumer credit industry.[1] The court's decision releases an entire class of creditors—"no-charge-for-credit" vendors—from the Act's disclosure requirements. Yet these are the kinds of creditors commonly operating in areas of maximum consumer abuse, such as land sales, home improvement contracts, ghetto sales of furniture, appliances and jewelry, correspondence schools, health spas, magazine subscription services and various door-to-door sales.

Currently, at least eight cases involving the issue presented by this case are pending in the trial courts;[2] another case is before the United States Court of Appeals for the Seventh Circuit on appeal from the district court's decision upholding the validity of the

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[1] This figure represents the total amount of outstanding installment consumer credit as of November 1971. *Federal Reserve Board Statistical Release*, G. 19 (Jan. 4, 1972).

[2] *Smith* v. *International Magazines Service* (D. W. Va., Civil Action No. 71-16-F); *Angel Padilla* v. *Patricia Cifarelli, d/b/a Mr. Dominick Auto Sales* (D. Conn., No. 14752); *Luis Acevedo* v. *Patricia Cifarelli, d/b/a Mr. Dominick Auto Sales* (D. Conn., Civil Action No. 14753); *Martin* v. *Family Publications Service* (D. Vt., Civil Action No. 5829); *Esposito* v. *Alan Nayer, d/b/a Educational Book Club of Maine* (D. Maine, Civil Action No. 11-142); *Rodrigues* v. *Family Publications Service, Inc.* (C.D. Calif., Civil Action No. 71-543-AAH); *Marques* v. *Family Publications Service* (W.D. Texas, No. SA 70 CA 356); *Baxter* v. *Holiday Spa* (Circuit Ct. for the 17th Judicial Circuit of Ill., No. G-26067).

four installment rule.[*] The Federal Trade Commission is withholding action on proposed complaints based on the four installment rule pending the outcome of this case. Uniform application of this important consumer protection statute, although essential, will not be possible in light of the decision of the court of appeals. Creditors throughout the country, particularly those with nationwide operations, are unsure about their disclosure obligations in transactions covered by the four installment rule. Only this Court can end the current uncertainty and confusion generated by what is in our view an erroneous decision that has serious implications regarding effective implementation of the Truth in Lending Act.

1. The purpose of the disclosure provisions of the Truth in Lending Act is to enable consumers to make informed judgments about the use of credit. 15 U.S.C. 1601. The Act requires that creditors make certain disclosures to consumers "upon whom a finance charge is or may be imposed." 15 U.S.C. 1631. "Finance charge" is defined as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. 1605(a).

Contrary to the holding of the court of appeals, the Act does not say that "there must be found present a 'finance charge' as defined by the Act" in order for consumer credit transactions to be covered by

[*] *Strampolos* v. *Premium Readers Service*, 326 F.Supp. 1100 (N.D. Ill.).

the disclosure obligations (Pet. App. 16a). The Act is applicable if a finance charge "may be imposed"; it is sufficient that the nature of the transaction renders the presence of such a charge likely. Disclosure of all required information is to be made at the outset, when the existence of a finance charge may not be apparent; the creditor is not to await the consumer's discovery of hidden charges before fulfilling his disclosure obligations. The very purpose of the Act is to relieve consumers of the burden of discovering such matters so that they will be assured of having sufficient information to decide whether to enter into the credit transaction.

Moreover, "finance charge," as defined in 15 U.S.C. 1605(a), is not limited to clearly identified charges. Congress recognized that the relationship between finance charges and the consumer credit transaction may often be attenuated and that this might preclude identifying actual finance charges in all cases. Thus "finance charges" include charges "indirectly" payable by the consumer and "indirectly" imposed by the creditor.

The foregoing provisions, together with the Board's regulatory authority, serve as the basis for the four installment rule. In passing the Truth in Lending Act Congress legislated in a relatively unregulated field. Realizing that if the Act is to be effective, creditors must be prevented from evading their statutory obligations, Congress entrusted the Federal Reserve Board with the task of formulating rules and regulations to secure compliance. The Board is authorized to issue regulations which "may contain such classifica-

tions, differentiations or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this [Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. 1604.[10]

After enactment of the Truth in Lending Act, the Board established a task force, including outside consultants experienced in the various aspects of consumer credit, for the purpose of drafting proposed regulations consistent with the Act's provisions and purposes. The Board received more than 1200 comments on the proposed regulations, which included the four installment rule, from industry, consumer groups, and federal and state agencies. The Board concluded that the four installment rule was necessary to prevent widespread evasion of the Act.[11]

Without such a rule, sellers who transacted most of their business by extending long term credit could easily evade the Act's disclosure requirements by des-

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[10] In one area for potential evasion, Congress dealt with the problem directly. Congress recognized that, since the Act would apply in general only in connection with sales of goods and services, sellers might attempt to modify the form of their contracts from sales to leases or bailments for the purpose of avoiding coverage. The Act therefore defines "credit sales" to include leases and bailments that are disguised conditional sales contracts, even though leases and bailments typically do not involve identified finance charges. 15 U.S.C. 1602(g).

[11] See Statement of Board Vice-Chairman J. L. Robertson, Hearings before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 91st Congress, 1st Sess., Part II, at 377–380.

ignating a theoretical cash price equal to the total price for an installment purchase, thereby giving the appearance that no finance charges were being imposed. See *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100, 1103 (N.D. Ill.). Moreover, when a creditor regularly extends long term credit it is probable that he is imposing a finance charge, even though it is not identified as such: when the consumer defers payments, the seller incurs a cost and that cost is likely to be passed on to the consumer. Thus, a finance charge "may be" imposed in this type of transaction. In addition, if each transaction had to be dissected after the fact in order to determine the existence of buried finance charges, there would be endless disputes over bookkeeping practices and other matters far-removed from the central purposes of the Act. The Board justifiably rejected any such approach in light of the great difficulties in administration and the lack of uniformity that would be bound to arise.

Where, as here, Congress has enacted remedial legislation and conferred broad rule-making authority upon an expert agency, the construction of the statute by that agency in regulations adopted after careful study is entitled to great weight. See *Thorpe* v. *Housing Authority*, 393 U.S. 268; *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315. As discussed above, the Board's four installment rule is authorized by the Act and is "not only sensible

but also necessary to prevent the Truth in Lending Act from becoming a hoax and delusion upon the American public." *Strompolos* v. *Premium Readers Service, supra,* 326 F. Supp. 1103. The court of appeals erred in holding otherwise.

2. The court of appeals also erred in holding the four installment rule unconstitutional (Pet. App. 21a–23a). In the court's view, the Board's rule violated the due process clause of the Fifth Amendment because it established a "conclusive presumption" that the creditor had imposed a finance charge. But characterizations cannot serve as a substitute for analysis.

What matters is whether the rule of law embodied in the Board's four installment regulation [12] is rationally founded pursuant to the Act. See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152. In our view, there is no doubt that the Board's rule meets that test. The only burden imposed on creditors is disclosure. In light of the substantial danger of evasion and circumvention in the absence of the four installment rule, the benefits to consumers from that rule and the great difficulty in administering the Act if a transaction-by-transaction approach were followed, the Board had ample justification for exercising its regulatory authority as it did.

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[12] The Act provides that any reference to the requirements of the Act includes "reference to the regulations of the Board." 15 U.S.C. 1602(q).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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